

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of Case

**Criminal Jail Appeal No.2101 of 2001
(Old No. 2175/1984)**

AND

Criminal Appeal No.2100 of 2001

AND

Criminal Appeal No.2102 of 2001

Date of decision :-23.07.2007

A.F.R. (Approved for Reporting)

Not approved for reporting

Date :-23.07.2007

Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

**Criminal Jail Appeal No.2101 of 2001
(Old No. 2175/1984)**

Dalip Singh S/o Sri Mara Singh
R/o Shirower Nagar
P.O. Akela Khada
Tehsil Gadarpur
District Nainital
At present District U.S. Nagar Appellant
Versus
State Respondent

AND

Criminal Appeal No.2100 of 2001

Dharama @ Dharam Singh (in jail) Appellant
Versus
State Respondent

AND

Criminal Appeal No.2102 of 2001

Palla @ Pahelwan Singh Appellant
Versus
State Respondent

Delivery of Judgment : 23rd July, 2007

Mr. Abdul Wahid learned Amicus Curiae for appellants.
Mr. G. S. Sandhu learned Govt. Advocate for respondent.

**Coram : Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.**

Per Hon'ble J.C.S. Rawat, J.

1. Since all these criminal appeals have arisen out of the common impugned judgment & order dated 03.12.1983 passed by Sri V. S. Bajpai, the then Addl. Sessions Judge, Nainital in S.T. No.88 of 1982, hence all the appeals have heard together and are being disposed of by this common judgment. By the impugned judgment and order, the appellants-Palla @ Pahelwan Singh, Dharama @ Dharam Singh and Dalip Singh were convicted and each of the appellants were sentenced to undergo R.I. for a period of one year

under section 147 IPC, to undergo imprisonment for life under section 302/149 IPC and to undergo R.I. for a period of 4 years under section 307/149 IPC. All the sentences were to run concurrently.

2. The facts, in nutshell, are that S.O. Nagendra Singh (deceased) was posted as Station Officer, P.S. Jaspur in the year 1982. On 23.01.1982 he alongwith S.I. Dharam Singh, S.I.-B.S. Garbiyal, Constables Surajpal Singh, Dharambir Singh and Amarpal Singh, all fully armed, went in search of the accused of crime no. 11/1982 under section 364 IPC and for recovering the kidnapped person Kartar Singh. They went to Bhogpur Dam and on 24.01.1982 they summoned additional police force from the police station. The police force arrived and joined the police party of S.O. Nagendra Singh (deceased). On that date the entire police force made a thorough search of the accused persons, but they could not get success in arresting the accused of crime No. 11/1982. On 25.01.1982 S.O. Nagendra Singh divided the entire force into two parts and himself remained the leader of first party which consisted of S.I. Dharam Singh PW1, Constable Vijaipal Singh PW8, Constable Balvender Singh PW3, Constable Tejpal Singh and Constable Bhawani Ram. The second party was placed under S.I.-B. S. Garbiyal and the remaining 11 constables were placed in that party. The first party went towards Tirath Mandir. The second party went towards the forest headed by S.O.-Nagendra Singh and reached at Atta Chakki of Ghanshyam Das. It was informed by Mukhtar Singh PW5 that five persons armed with deadly weapons were present inside the hut of Uttam Singh and they had

detained Inder Singh – father of Mukhtar Singh, Harnam Singh and Uttam Singh – both uncle of Mukhtar Singh in that hut. It was further informed by Mukhtar Singh that the accused persons were enquiring the whereabouts of Kripal Singh and they were threatening to kill all these four persons together. Mukhtar Singh disclosed the name of these five persons as Dharma @ Dharam Singh, Palla @ Pahelwan Singh, Dalip Singh, Mana Singh and Gurdip Singh, out of which, the first three are appellants before us. It was also disclosed by Mukhtar Singh that these accused persons were saying that “*Tumhe police ki mukhbiri karne wa gawahi dene ka maja chakhayange.*” On this information, S.O.-Nagendra Singh and the members of his party reached at the house of Uttam Singh at about 4:30pm accompanied by the informant Mukhtar Singh. When they reached there they heard some noise coming from inside the house of Uttam Singh. The accused persons were saying that “*Kripal Singh batawo kaha hain. Tum charo ko ek sath marenge aur police ki mukhbiri karne ka maja chakhayange.*”. S.I.-Nagendra Singh at once challaneged the accused persons to surrender since they had been surrounded by the police. He also asked them to release Uttam Singh and others. The accused persons released Uttam Singh and others but all of a sudden started firing on the police party due to which Constable Vijaipal Singh PW8 sustained gun-shot injuries on his person. In the self-defence, the police party also opened fire and S.O.-Nagendra Singh again challenged the accused persons to surrender. At that very moment all five persons (appellants and their associates) tried to come out from the house of Uttam Singh and they continued firing

from their fire-arms. S.O.-Nagendra Singh rushed ahead with his revolver and succeeded in catching hold of one of the associates of the accused, namely Gurdip Singh. At the same time, the other accused persons fired on S.O.-Nagendra Singh due to which he sustained grievous injuries and died at the spot. The firing between the police party and the accused persons continued for about 20-25 minutes with the result that two associates of the appellants Gurdip Singh and Mana Singh were killed at the spot and the remaining three accused (appellants), who have been convicted by the trial court, succeeded in running away from the place of occurrence. S.I.-Dharam Singh then sent information about this incident to S.I.-B. S. Garbiyal, leader of the second party and this party also arrived at the place of occurrence. Injured Constable Vijaipal Singh PW8 was then carried on a tractor to the hospital. S.I.-Dharam Singh PW1 went to the police station where he lodged a verbal FIR (Ex.ka.1) at 7:45 p.m. on 25.01.1982. On the basis of report, the Chick FIR Ex.ka.1 was prepared and necessary entries were made in the general diary. The body of deceased S.O.-Nagendra Singh and two associates of the accused, namely, Gurdip Singh and Mana Singh was left at the place of occurrence under the watch of the police constables. H.C. Karnatak, S.D.M., Kashipur (PW10) was informed of the incident and he accompanied the investigating officer to the place of occurrence. After appointing panches he prepared the inquest report Ex.ka.5 and other connected papers. After completing the investigation, the Investigating Officer submitted the chargesheet before the court against the appellants.

3. After submission of chargesheet the appellants-accused were committed to the court of Sessions for trial and the trial court framed charges against the accused persons. They denied the charges levelled against them and claimed their trial.

4. The prosecution in support of its case examined as many as thirteen witnesses. S.I. Dharam Singh PW1 was also present at the place of occurrence during the course of firing. Dr. J.C. Arora PW2 was the Medical Officer who conducted the postmortem of deceased S.O. Nagendra Singh. Constable Balvender Singh PW3 was also a member of the police force and he is the eyewitness of the incident. Harnam Singh PW4 was also kidnapped by the accused persons. He was the brother of Inder Singh, Uttam Singh and Kripal Singh. Mukhtar Singh PW5 was the informant, who was the son of Inder Singh. Dr. D. C. Dhyani PW6 examined the injuries of Constable Vijaipal Singh PW8. Constable Harpal Singh PW7 proved the chick FIR. Constable Vijaipal Singh PW8 is an injured eye-witness of the incident. Sher Singh PW9 is the panch witness of inquest report. H.C. Karnatak PW10 was the then S.D.M, Kashipur. He inspected the place of occurrence immediately after the incident and prepared the inquest report. S.I.-A.K. Chaturvedi PW11 is the Investigating Officer of this case. S.I.-Ajaipal Singh PW12 has proved the factum of discovery of arms at the pointing out of appellants. Om Prakash Mani Tripathi PW13 is the Ballistic Expert.

5. The accused persons were examined u/s 313 Cr.P.C. and they have pleaded not guilty to offence.

They have stated that they have been falsely implicated in this case.

6. The learned trial court on appreciation of the evidence held the appellants guilty and convicted and sentenced them as mentioned above.

7. We have heard learned counsel for the appellants and learned Addl. Government Advocate for the respondent-State. Perused the record carefully.

8. It needs to be mentioned here that it is not disputed that on 25.01.1982 an incident of firing took place between the police party and the accused persons (appellants & their associates). It is not disputed that two associates of the appellants i.e. Gurdip Singh and Mana Singh and one member of police party i.e S.O. Narendra Singh died in the incident. It is not disputed that deceased S.O.-Nagendra Singh died on account of fire-arm injuries sustained by him on the date of occurrence. Dr. J.C. Arora (PW2), Medical Officer conducted the postmortem of deceased-S.O.-Nagendra Singh on 26.01.1982 at 6p.m. and found following ante-mortem injuries on the person of the deceased:-

- (i) Lacerated wound 9cm x 6cm x bone deep on left cheek, 2cm below left ear. Tattooing present.
- (ii) Two fire arm injuries of entry 1.5cm x 1cm, 1.5cm apart from each other just above left clavicle middle part clavicle and fractured, chest cavity deep.
- (iii) Two fire arm injuries of entry 2cm x 1.5cm and 1cm x 1cm ½cm apart from each other 13cm below and outer side of left nipple at 5 o'clock position on chest.

- (iv) Lacerated wound 11cm x 7cm x muscle deep on left arm front middle part tattooing present.

In the opinion of Medical Officer, the age of the deceased was about 35 years and the deceased died about a day before. It was further opined that the death of the deceased was caused due to shock and haemorrhage resulting from the ante-mortem injuries. Thus, it is amply established that deceased-Nagendra Singh died on account of fire-arm injuries sustained by him on the date of occurrence.

9. Dr. D. C. Dhyani (PW6), Medical Officer examined the injured Vijaipal Singh PW8 on 25.01.1982 at 8pm and found following injuries on his person: -

- (i) A chain circular punched out apertime area about 3cm x 1½ cm. Bone deep over right elbow joint over lateral epieodgile of humerus lower end. Fresh bleeding seen. Advised X-ray. Right elbow joint AP & left blackening of the surrounding skin.
- (ii) Lacerated wound 6cm x 3½cm. Skin deep over right forearm. Post side 8cm below from 1st injury. Blackening of the tissue surrounding the wound & burn smell of skin present. Fresh bleeding seen.
- (iii) Lacerated wound 1cm x 1cm skin deep over right elbow joint 3cm. Laterally & back from 1st injury. Fresh

bleeding seen. Advised X-ray AP & left view.

In the opinion of Medical Officer, injury no.1 was caused by fire arm but no bullet was seen in x-ray report. Injury no.2 was caused by firearm and injury no.3 was caused by blunt object. It is further established that the injured Vijaipal sustained the fire arm injuries on the time and date of occurrence.

10. The prosecution has adduced the evidence of eye-witnesses i.e. S.I. Dharam Singh PW1, Constable Balvender Singh PW3, Constable Vijaipal Singh PW8, Harnam Singh PW4 and Mukhtar Singh PW5. S.I. Dharam Singh PW1, Constables Balvender Singh PW3 and Constable Vijaipal Singh PW8 had categorically stated in their evidence that the police party received the information from Mukhtar Singh PW5 that five persons armed with deadly weapons were present inside the house of Uttam Singh and they had detained Inder Singh – father of Mukhtar Singh, Harnam Singh – uncle of Mukhtar Singh and Uttam Singh-uncle of Mukhtar Singh in the house of Uttam Singh. The accused persons were inquiring the whereabouts of Kripal Singh. They were threatening to kill them. Mukhtar Singh PW5 also disclosed the names of accused persons. On this information, S.O. Nagendra Singh (deceased) alongwith his police party and informant reached near the house of Uttam Singh and challenged the appellants and their associates to surrender them before the police since they had been surrounded by the police. The appellants and their associates after releasing detained persons started

firing upon the police party, due to which S.O. Nagendra Singh sustained fire-arm injuries and died at the spot. Constable Vijaipal Singh PW8 also sustained fire-arm injuries during the incident. Thus, it is amply established that the incident took place on 25.01.1982, in which S.O. Nagendra Singh sustained gunshot injuries and died at the spot and Constable Vijaipal Singh also sustained injuries on his person. Thus, the prosecution evidence establishes the place and time of the incident.

11. Now, we have to consider whether the appellants-accused were responsible for causing death of the deceased and for causing injuries on the person of injured Vijaipal Singh PW8. The prosecution had adduced the evidence of S.I. Dharam Singh PW1, Constable Balvender Singh PW3, Harnam Singh PW4, Mukhtar Singh PW5 and Constable Vijaipal Singh PW8. S.I. Dharam Singh PW1, Constable Balvender Singh PW3 and Constable Vijaipal Singh PW8 have stated in their evidence that on 24.01.1982 S.O. Nagendra Singh (deceased) summoned additional police force from the police station. It is also in the evidence that on 23.01.1982 S.O.-Nagendra Singh alongwith S.I. Dharam Singh, S.I. B. S. Garbiyal and some Constables went in search of the accused of crime no.11/1982 under section 364 IPC and for recovering the kidnapped person Kartar Singh. The additional police force was made available to S.O. Nagendra Singh in order to search the accused persons and the kidnapped person. On 25.01.1982 S.O. Nagendra Singh divided the entire force into two parts and himself remained the leader of first party which consisted of S.I. Dharam Singh, Constable Vijaipal Singh, Constable Balvender Singh

Constable Tejpal Singh and Constable Bhawani Ram. The second party was placed under S.I.-B. S. Garbiyal and the remaining 11 constables were placed in that party. The police party went towards the forest headed by S.O.-Nagendra Singh and reached at Atta Chakki of Ghanshyam Das. It was informed by Mukhtar Singh that five persons who were armed with deadly weapons were present inside the '*Jhala*' (house) of Uttam Singh and they had detained Inder Singh – father of Mukhtar Singh, Harnam Singh and Uttam Singh both uncle of Mukhtar Singh in that house and are enquiring about the whereabouts of Kripal Singh. They were threatening to kill all these four persons together. When the police party reached at the spot S.O. Nagendra Singh (deceased) challenged the accused persons and directed them to release the detained person. The appellants and their associates released Uttam Singh and others but they started firing on the police party resulting injuries on the person of Vijaipal Singh PW8. When Constable Vijaipal Singh PW8 sustained injuries on his person police party opened fire and S.O. Nagendra Singh (deceased) took out his revolver and also fired and tried to catch hold of the accused persons. The appellants and their associates (accused persons) tried to escape from that house under the cover of heavy firing. When S.O. Nagendra Singh (deceased) tried to catch hold of Gurdip Singh he was shot dead by the appellants and their associates. S.O. Nagendra Singh (deceased) sustained gun-shot injuries and died at the spot. The firing between the miscreants and the police party continued for about 20-25 minutes with the result that two associates of the appellants Gurdip Singh and Mana Singh also died at

the spot and the appellants-accused made their escape good from the place of occurrence. S.I. Dharam Singh PW1 then sent the information about the incident to S.I.-B.S. Garbiyal who was leading the second police party. After sometime, the second police party also reached at the spot.

12. Hanam Singh PW4 was also produced by the prosecution in support of its case. He had stated in his evidence that he is the brother of Inder Singh, Uttam Singh and Kripal Singh. The appellants and their associates forcibly entered into the house of his brother Inder Singh and they took him forcibly to his house where he was also caught hold by the accused. Thereafter, they took them in the Jhala (house) of Uttam Singh where all of them were detained. When the appellants and their associates entered into the house of Uttam Singh they started threatening to kill them and they were enquiring the whereabouts of their 4th brother Kripal Singh. They were threatening them to kill all four brothers together. The appellants and their associates were having arms in their hands. He, Inder Singh and Uttam Singh were requesting them to release them, but the appellants and their associates were not acceding to their request. Meanwhile, the police party headed by S.O. Nagendra Singh reached inside the Jhala of Uttam Singh and challenged the appellants and their associates. Uttam Singh and others were released by the accused, but all of a sudden the appellants and their associates started firing upon the police party. Thereafter, the police party also fired in their self-defence. S.O. Narendra Singh (deceased) caught hold of Gurdip Singh. On this, the accused appellant Palla @ Pahelwan Singh fired

upon S.O. Nagendra Singh due to which he sustained gunshot injuries and died at the spot.

13. The prosecution has also adduced the evidence of Mukhtar Singh PW5, who has stated in his evidence that his father Inder Singh and his uncles Harnam Singh and Uttam Singh were forcibly detained in the Jhala of Uttam Singh by the appellants and their associates. He was going towards the Atta Chakki of Ghanshyam Das. When he reached near the Atta Chakki he informed S.O. Nagendra Singh that five persons armed with deadly weapons were present inside the Jhala (house) of Uttam Singh and they had detained his father Inder Singh and his uncles Uttam Singh and Harnam Singh. He also informed that the accused persons were enquiring the whereabouts of Kripal Singh and they were threatening to kill them. He also accompanied the police party to the Jhala of Uttam Singh and narrated the entire incident which has been stated by S.I. Dharam Singh PW1, Constable Balvender Singh PW3, Harnam Singh PW4 and Constable Vijaipal Singh PW8.

14. There is no doubt that Constable Vijaipal Singh PW8 is an injured eye-witness as he sustained injuries in the same incident. He has narrated the entire incident as mentioned above. Eye-witnesses, namely S.I. Dharam Singh PW1, Constable Balvender Singh PW3 and Mukhtar Singh PW5 have corroborated the evidence of Constable Vijaipal Singh PW8. All the eye-witnesses have fully supported the prosecution version. They were cross examined at length, but nothing could be elicited in their cross examination to discredit their testimony. All the eye-witnesses remained consistent

in their cross examination with regard to the factum of incident. Moreover, the presence of the injured eye-witness Constable Vijaipal Singh PW8 cannot be doubted. He has sustained gun-shot injuries in the same incident and the prosecution has proved the same. The injured witness stands on a higher pedestal than ordinary eye witness. It is also well settled that the testimony of the injured eye-witness is sufficient to base the conviction and no further corroboration is required. His testimony is credible and cogent. The presence of the injured witness cannot be ruled out. The testimony of an injured witness has its own relevance and efficacy. The fact that the witness lends support to his testimony that the witness was present during the occurrence. {Vide **Narendra Nath Khaware Vs. Parasnath Khaware and others 2003 SCC (Cri) 1144 and State of U.P. Vs. Kishan Chand and others 2004 SCC (Cri) 2013**}.

15. Learned Amicus Curiae for the appellants contended that in the evidence of A.K. Chaturvedi (I.O.) PW11 it has come that the length and breadth of Jhala of Uttam Singh was about 10 x 6 paces and the height of the said Jhala was about 10-12 feet. Three appellants and their associates alongwith three abducted persons and two family members of Uttam Singh were inside the Jhala of Uttam Singh. There was only one door in the said Jhala. When the police party reached at the spot and they challenged the appellants and their associates and directed to release the abducted persons. It was contended that it was impossible that the persons sitting inside the Jhala would rush out immediately outside the house. Learned

G.A. refuted the contention. The prosecution has led the evidence to the fact that S.O. Nagendra Singh (deceased) challenged the appellants and their associates to release the abducted persons immediately. In consequence of the said warning they released the abducted persons and opened fire. When the police tried to enter into the Jhala of Uttam Singh. S.O. Nagendra Singh was prevented and he grappled with one of the miscreants viz. Gurdip Singh. In the meantime, other miscreants fired upon S.O. Nagendra Singh (deceased) due to which he sustained gunshot injuries and died at the spot. Thus, there was sufficient time for the appellants to run away from the spot and to fire upon the police party. It is natural when the police party was there the appellants and their associates would try to make their escape good and for this reason they would try to fire upon the police party so that they might not be arrested. Thus, the contention advanced by the Amicus Curiae for the appellants is not tenable in the facts and circumstances of this case.

16. It was further contended on behalf of the appellants that there is variance in between the medical evidence and the ocular evidence. He further pointed out that the injuries shown in the postmortem report reveal that the deceased sustained fire-arm injuries on the front side of his body. It was further contended that S.O. Nagendra Singh was killed while he was grappling with Gurdip Singh, as such there was no occasion to sustain injuries on the front side of his body and he should have sustained fire-arm injuries on his back. Learned G.A. refuted the contention. Perusal

of the injuries sustained by S.O. Nagendra Singh (deceased) clearly reveals that he sustained injuries on the front part of his body. It is also in the prosecution evidence that the appellants and their associates were inside the house. S.O. Nagendra Singh (deceased) challenged the appellants and their associates from outside the Jhala of Uttam Singh. Immediately after releasing the abducted persons the appellants and their associates started firing upon the police party. It is evident that the accused and the police party was in front of each other. It is also in the evidence that S.O. Nagendra Singh (deceased) tried to enter into the Jhala and he started grappling with Gurdip Singh in the meantime he was shot dead by the appellants. It is natural that the accused appellants and their associates were in front of the deceased. As such, the injuries, which have been caused to the deceased, were on the front part of his body. There is no evidence on record that the appellants and their associates fired from the back side of the deceased. It is also pertinent to mention here that the medical evidence is no the substantive piece of evidence, it is only a corroborative piece of evidence. In the case in the hand, the injuries sustained by the deceased at the time of incident is further corroborated by the medical evidence. We are completely in agreement with the finding recorded by the trial court. Therefore, we do not find any force in the contention raised on behalf for the appellants.

17. It was further contended that the prosecution has narrated an improbable story that Mukhtar Singh PW5 met with S.O. Nagendra Singh (deceased) at Atta Chakki of Ghanshyam Das and on the information of

Mukhtar Singh PW5 the police party proceeded towards the place of occurrence, particularly when the police party was in search of abducted persons and the accused persons who had abducted Kartar Singh. It was further contended that if the police party had received information it should have been recorded in the police station and then the police party should have proceeded towards the place of incident. Learned G.A. refuted the contention. The police had a duty to maintain the law and order situation and also to protect the lives of the citizens. When the police party received such an information it was obligatory on the part of police first to proceed to the place of occurrence and not to involve in technicalities. The police party in discharge of official duty proceeded at the spot and got released the detained persons from the grip of accused persons. Therefore, we do not find any force in the contention raised by learned Amicus Curiae for the appellants.

18. It was further contended that from the facts and circumstances of the case no offence under section 302 IPC is made out against the appellants. It was further contended that at the most even if the evidence was found credible against them, the offence punishable under section 304 part-II IPC is only made out against the appellants. The learned G.A. refuted the contention. The pivotal plea taken by the appellants relates to the applicability of Exception 4 of 300 IPC. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage. The Fourth

Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by First Exception. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel manner, and (d) the with must have been with the person killed. In the case in hand it cannot be said that the incident took place without premeditation. The appellants and their associates were armed with fire arms to kill the abducted persons who were in their detention. It is established that they could have gone to any extent to fulfill their illegal motive. The appellants, therefore, are not entitled to get the benefit of Exception of Section 300 I.P.C. in the facts and circumstances of this case.

19. In **Virsa Singh Vs. State of Punjab AIR 1958 SC 465 & 1958 Cr.L.J. 818**, the Hon'ble Supreme Court has held that a culpable homicide is murder under section 300 clause III, if the prosecution establishes four elements – (i) the presence of a bodily injury, (ii) nature of such bodily injury, (iii) intention on the part of the accused to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and (iv) the injury was sufficient to cause death in the ordinary course of nature. Dealing with the question, as to how intention is to be inferred, Vivian Bose J. succinctly stated:-

“In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention

to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted.

The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that he appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question."

20. The intention which is a state of mind cannot be proved by the direct evidence as a fact it can only be inferred from the facts and circumstances of each case. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as

that will decide whether the case falls under section 302 or 304 Part-I or 304 Part-II. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether there accused dealt a single blow or several blows. In the present case, as noticed above, the appellants and their associates were having dangerous weapons at the time of incident. The appellants and their associates caused indiscriminate firing upon the police party. If they had no intention to cause death of the deceased they would not have fired several gun-shots on the police party. The intention of appellants to cause death or at all events intention of causing bodily injury which is sufficient in the ordinary course of nature to cause death was made out. The circumstances to bring the case under Exception 4 to Section 300 do not exist. The police party reached at the spot in discharge of their official duty. The appellants and their associates fired upon the police

party and in the self defence the police party fired upon the appellants and their associates. The appellants and their associates had caused serious injuries on the vital parts of the body of the deceased as well as on the injured. Thus, we have no hesitation to hold the appellants guilty under section 302 IPC. We are completely in agreement with the findings recorded by the trial court with regard to the conviction of appellants under section 302 IPC.

21. Learned Amicus Curiae for the appellants contended that there was no common object of the appellants and their associates to cause death of S.O. Nagendra Singh and to cause injuries on the person of Constable Vijaipal Singh PW8. It was further contended that the appellants and their associates were armed with guns. In this situation, S.O. Nagendra Singh (deceased) caught hold of one of the accused persons, namely Gurdip Singh. It was further contended that the conduct of police party was unnatural because they had a knowledge that the accused were armed with deadly weapons inspite of the fact that they entered into the '*Zhala*'. As such, this conduct makes the entire prosecution story unreliable. Learned G.A. refuted the contention. The conduct of police party was natural because they were doing their duty so that the law and order situation may not be disturbed. It has come in the evidence that the appellants and their associates were having deadly weapons. On this, the police party directed them to surrender. Instead of surrendering the appellants and their associates started indiscriminate firing upon the police party. The police party tried to overpower the appellants and their

associates so that such hardened criminals may be apprehended. As the policemen discharged their duties, it cannot be said that the conduct of the police party was unnatural. We do not find any force in the contention of learned Amicus Curiae for the appellants.

22. For the purpose of attracting section 149 IPC, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose. In the case of **Bishna Vs. State of W.B. 2006(1) SCC(Cri) 696** has held that :-

“63. Mizaji v. State of U.P. 1959 Cri. L.J. 777 it was observed:

“Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression ‘know’ does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all.”

In **Masalti V. State of U.P., AIR 1965 SC 202**, it was held.:-

“17. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.”

23. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the

punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

24. The Hon'ble Supreme Court in **Bhajan Singh v. State of U.P. 1974 SCC(Cri) 604:-**

“13. Section 149 IPC constitutes, per se, a substantive offence although the punishment is under the section to which it is tagged being committed by the principal offender in the unlawful assembly, known or unknown. Even assuming that the unlawful assembly was formed originally only to beat, it is clearly established in the evidence that the said object is well knit with what followed as the dangerous finale of, call it, the beating. This is not a case where something foreign or unknown to the object has taken place all of a sudden. It is the execution of the same common object which assumed the fearful character implicit in the illegal action undertaken by the five accused.”. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly.

25. Section 149 IPC consists to two parts. The first part of the Section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful

assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object.

26. The Hon'ble Supreme Court has observed in the case of **Masalti Supra**, which is as follows:-

"15 Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well founded. Where a crowd of assailants who are members of an unlawful assembly who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is

often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

16.

17. Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly, knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

27. The above decision was also followed in the decisions of the Hon'ble Apex Court in **Charan Singh & others Vs. State of U.P. 2004(4) SCC 205, Ram Dular Rai Vs. State of Bihar 2003(12) SCC 352 and Bishna Vs. State of W.B. 2006(1) SCC(Cri) 696.**

28. In the facts and circumstances of the present case, we can safely hold that the appellants and their associates had a common object to kill the members of the police party so that they might not be arrested by the police party. The appellants and their associates in furtherance of the said common object fired gunshots on the police party, due to which one died at the spot and other sustained injuries on his person. We have been taken through the evidence and cross examination of the witnesses by the learned Amicus Curie for the appellants. On a conspectus of various relevant features of the case including the genesis; the nature of the incident; the nature of the weapons carried by them and part played by the appellants and their associates at the scene of the occurrence reveal a common object of the appellants to cause the injuries on the person of the deceased and the injured. It is evident from the prosecution evidence that all the accused person were present at the spot. It cannot be concluded from the prosecution evidence or from any probability arising from the record that all the accused persons had been falsely implicated in the case. After going through the evidence on record, we do not find any reason to disbelieve the version of the prosecution witnesses. We are completely in agreement with the findings recorded by the trial court in this regard.

29. Learned Amicus Curiae for the appellants further contended that the appellants had been wrongly convicted under section 307 IPC for causing bodily injuries to Vijaipal Singh PW8. It was further contended that the appellants and their associates had no intention to cause such bodily injuries to Constable Vijaipal Singh PW8. It was further contended that Vijaipal Singh PW8 had not sustained injuries on the vital parts of the body. As such, the offence under section 307 IPC is not made out. Learned GA refuted the contention. To constitute an offence under section 307 IPC Two ingredients of the offence must be present: (a) an intention or knowledge relating to commission of murder; and (b) the doing of an act towards it. For the purpose of section 307 what is material is the intention or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. The section clearly contemplates an act which is done with intention of causing death but which fails to bring about the intended consequence on account of intervening circumstances. The intention or knowledge of the accused must be such as is necessary to constitute murder. In the absence of intention or knowledge which is the necessary ingredient of section 307 IPC, there can be no offence "of attempt to murder". Intent which is a state of mind cannot be proved by precise direct evidence, as a fact it can only be detected or inferred from other factors. Some of the relevant considerations may be the nature of the weapon used; the circumstances in which the incident took place and the injured has sustained injuries by indiscriminate

firing. In the case in hand, the prosecution has proved that the fire-arms causing injuries to the injured was being used by all the appellants and their associates for causing fatal injuries of the police party. The appellants and their associates tried to scot-free from the clutches of police and they intended to kill the police party so that the police party may not arrested them. Thus, there was a clear intention on the part of the appellants to cause death of police personnel. Under section 307 what is material is the intention or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. We have already discussed the evidence which clearly reveals that the appellants and their associates had an intention to caused bodily injuries on the person to cause the death of Vijaipal Singh PW8 and to cause death the S.O. Nagendra Singh (deceased) so as to make their escape good from the place of occurrence. It is established that S.O. Nagendra Singh (deceased) was shot dead at the spot by the appellants. The appellants and their associates opened firing upon the police party. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew to be likely to be committed in prosecution of common object, every person who is a member of the same assembly is guilty of that offence. After considering the nature of the weapon used and the circumstances in which the injuries were caused, we are of the view that the prosecution has established that there was an intention to kill the members of the police party by indiscriminate firing by the appellants and their associates. Thus, the

trial court has rightly convicted the appellants under section 307/149 IPC.

30. In view for the foregoing discussion, we are completely in agreement with the findings recorded by the trial court. We are of the considered view that the trial court has rightly convicted and sentenced the appellants. Therefore, we hold that the prosecution has established the guilt beyond reasonable doubt against the appellants and there is no infirmity in the judgment passed by the trial court.

31. Hence, the appeals are dismissed and the conviction and sentences awarded by the Trial court against the appellants are confirmed.

32. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

(J.C.S.Rawat, J.) (Rajeev Gupta, C.J.)

Dated 23rd July, 2007

LSR